

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**Comments of the Public Utility Commission of Texas and
Petition for Waiver of Filing Requirements**

The Public Utility Commission of Texas (Texas PUC), having regulatory authority over public utilities within our jurisdiction in Texas, respectfully submits these comments in response to the *Notice of Proposed Rulemaking (NPRM)* issued by the Federal Communications Commission (FCC) in the above-captioned proceeding.¹ As discussed in the *NPRM*, the FCC is seeking comment on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended, consistent with *USTA II*.²

Additionally, the FCC seeks information from the states regarding their proceedings implementing the *Triennial Review Order (TRO)*.³ In response, the Texas PUC is providing a non-conclusive summary of each of its *TRO* proceedings and four copies of compact discs (CDs) containing the record evidence gathered in each of the proceedings. (The CDs are available for inspection at the FCC.) Due to the voluminous nature of the evidentiary record, the Texas PUC is requesting herein a waiver of certain filing requirements.

¹ *In re Unbundled Access to Network Elements, Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) (*NPRM*).

² *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

³ *Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, Report & Order and Order on Remand & Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) (*Triennial Review Order or TRO*).

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I. Executive Summary

The Federal Communications Commission (FCC) has requested that the states provide their records collected during proceedings implementing the *TRO*. The Texas PUC initiated five proceedings to implement the *TRO*. No party challenged the FCC's finding of non-impairment with respect to enterprise-market switching in Texas, and the Texas PUC focused its resources on the remaining four proceedings – Batch Hot Cuts Process, Mass Market Switching, Dedicated Transport and Enterprise Market Loop Facilities.

The Texas PUC is providing herein a summary of each of these four *TRO* proceedings, a summary of the procedural history (see Appendices 1A-1D), the Record Exhibit Indexes from each proceeding (attached Appendices 2A-2D), and the Preliminary Orders and Supplemental Preliminary Orders issued by the Texas PUC outlining the major issues for the parties to address in the proceeding (see attached Appendices 3A-3D). The summaries herein provide a high-level synopsis of parties' positions, rather than specific Texas PUC findings. This is a result of Texas abating its *TRO* proceedings – in light of the *USTA II* decision – prior to reaching any conclusions on the evidence presented. The Texas PUC further notes that, in each proceeding, much of the dispute centered on the correct interpretation of the *TRO* and the Commission's implementing rule language, and not on factual disputes about the evidence presented.

In addition, due to the voluminous nature of the record gathered during the course of these projects, the Texas PUC respectfully requests a waiver of the filing requirements and seeks to submit the evidentiary record for each proceeding on CDs.

The Texas PUC dedicated every available resource to these proceedings until the *USTA II* decision was issued, vacating the *TRO*. At that time, the Texas PUC voted to abate its *TRO* proceedings in part due to the stay, as well as the FCC's announcement that it would release interim UNE rules in response to the Court's action. These proceedings remain abated.

II. Texas PUC Actions Pursuant to the *TRO*

The Texas PUC initiated the following *TRO* proceedings: Docket No. 29175 – *Mass Market Hot Cut Process Project for State Implementation of the Federal Communications*

Commission's Triennial Review;⁴ Docket No. 28607 – *Impairment Analysis for Local Circuit Switching for the Mass Market*; Docket No. 28608 – *Impairment Analysis of Local Circuit Switching for the Enterprise Market*;⁵ Docket No. 28744 – *Impairment Analysis for Dedicated Transport*, and Docket No. 28745 – *Impairment Analysis for Enterprise Market Loop Facilities*.

In response to the paragraph 15 of the *NPRM*, the Texas PUC is providing herein a summary of each of its four *TRO* proceedings, a summary of the procedural history (see Appendices 1A-1D), the Record Exhibit Indexes from each of the *TRO* proceedings (attached Appendices 2A-2D), and the Preliminary Orders and Supplemental Preliminary Orders issued by the Texas PUC outlining the major issues for the parties to address in the proceeding (see attached Appendices 3A-3D).

Accompanying these comments are four sets of compact discs (CDs) (a total of XXX CDs) containing the records from each of the *TRO* proceedings. Included therein are (1) the record evidence; (2) parties' briefs and reply briefs; (3) hearing transcripts; and (4) selected transcripts from the Texas PUC's Open Meeting discussions of the *TRO* proceedings.

III. Texas PUC's *TRO* Proceedings

A. Docket No. 29175 – Mass Market Hot Cut Process Project for State Implementation of the Federal Communications Commission's Triennial Review (Batch Hot Cut Process)

SBC Texas proposed a batch migration process that is a modification of its existing process.⁶ The three processes comprising SBC Texas's proposal were the Enhanced Daily Process (EDP), Defined Batch Process (DBP) and Bulk Batch Process (BBP), which could be ordered either as a coordinated hot cut (CHC) or on frame due time (FDT). In addition, SBC Texas proposed to make each of the processes available if a loop being migrated is served via integrated digital loop carrier (IDLC). Each of the processes was flat-rated, and SBC Texas provided a prefiled cost study to support its proposal.

⁴ Texas PUC Staff participated as a party in the batch hot cut proceeding.

⁵ No party challenged the FCC's finding of no impairment for enterprise market circuit switching and this docket was closed on October 7, 2003.

⁶ Docket No. 29175, SBC Texas' Batch Hot Cut Proposal (Jan. 23, 2004).

No other party filed a batch cut process, but rather proposed modifications to SBC Texas's proposed processes. The costliest and most controversial element of SBC Texas's proposed process was the manual "lift and lay" component. AT&T and MCI proposed variations of SBC Texas's processes that sought fully-automated lift and lay processes, however, neither proposal contained a full cost analysis. The parties did not dispute that two or more loops constituted a batch.

The competitive local exchange carriers (CLECs) argued that SBC Texas's proposed batch cut processes did not meet the *TRO*'s standards and were not sufficient to cure CLEC impairment.⁷ MCI argued that SBC Texas's processes failed to include a sufficient CLEC-to-CLEC migration process.⁸ Covad argued that, because SBC Texas has no proposal at all for migrations of the data portion of customer loops, the Texas PUC should maintain the *status quo* until SBC Texas has developed, implemented, tested and demonstrated reliable and robust operation of migration procedures and operational support systems for batch hot cuts of voice plus data loops.⁹ MCI also argued that SBC Texas should also have included a process for migrating data loops.¹⁰ In addition, AT&T and Birch maintained that performance measures and other penalty remedies would be necessary to minimize the risks of SBC Texas's proposed batch cut processes to CLECs.¹¹

B. Docket No. 28607 – Impairment Analysis for Local Circuit Switching for the Mass Market (Mass Market Switching)

SBC Texas, the only incumbent local exchange carrier (ILEC) that argued non-impairment for mass market switching, argued that the appropriate geographic definition to consider impairment in mass market local switching in Texas is the Metropolitan Service Area (MSA), and that CLECs are not impaired without access to local circuit switching to serve mass-

⁷ Docket No. 29175, Direct Testimony of Mark David Van De Water on behalf of AT&T at 7-10, 21 (Mar. 5, 2004); Rebuttal Testimony of Tad Jerret Sauder on behalf of Birch Telecom at 3-5 (Mar. 26, 2004) (Sauder Rebuttal); Direct Testimony of Sherry Lichtenberg and Michael Starkey on behalf of MCI at 16 (Mar. 26, 2004) (Lichtenberg Direct).

⁸ Docket No. 29175, Lichtenberg Direct at 26-32.

⁹ Docket No. 29175, Direct Testimony of Catherine F. Boone on behalf of Covad Communications at 3-4 (Mar. 5, 2004).

¹⁰ Docket No. 29175, Lichtenberg Direct at 34.

market customers in the following five Texas MSAs: Austin-Round Rock, Corpus Christi, Dallas-Fort Worth-Arlington, Houston-Baytown-Sugar Land, and San Antonio.¹² Further, SBC Texas argued that the appropriate cutover point for the mass market is three loops or less, that is, customers served by four or more DS0 loops are in the enterprise market.¹³

The CLECs disputed SBC Texas's geographic definition, claims of impairment in all five MSAs (particularly SBC Texas's methodology of counting CLEC switches toward the non-impairment trigger), and SBC Texas's proposed three-line cutover. AT&T recommended a DS0 cutover point of 13 or more lines,¹⁴ and cautioned that, if the Texas PUC were to adopt MSA as the geographic market, it must consider whether a CLEC is serving the entire MSA before that CLEC counts toward the switch "trigger."¹⁵ The CLEC Coalition argued that local access transport areas (LATAs) should be adopted as the geographic market for an impairment analysis,¹⁶ identified six criteria to use in evaluating whether a CLEC switch should be counted toward the trigger for non-impairment,¹⁷ and recommended that a DS0 cutover of 13 or more lines be adopted.¹⁸ Logix maintained that the appropriate cutover point would be at least 12 channels of service, for customers with shorter loops the minimum would be 11 channels, and for long loops, the minimum would be 14-16 loops.¹⁹ MCI maintained that the wire center is the appropriate geographic definition,²⁰ and that every customer served by a CLEC over a DS0 loop would be a mass market customer, regardless of the number of lines that customer has, in effect making the cutover point the market for DS1-level switching.²¹

¹¹ Docket No. 29175, Rebuttal Testimony of Mark David Van De Water on behalf of AT&T at 18-32 (Mar. 26, 2004); Sauder Rebuttal at 13-16.

¹² Docket No. 28607, SBC Texas's Phase I Identification of Initial Areas for Mass Market Switching at 3-4 (Oct. 27, 2003). *See also* Docket No. 28607, Direct Testimony of Jon R. Loehman on behalf of SBC Texas at 6-7 (Feb. 9, 2004).

¹³ *Id.* at 16.

¹⁴ Docket No. 28607, Direct Testimony of Steven E. Turner on behalf of AT&T at 45 (Feb. 9, 2004).

¹⁵ Docket No. 28607, Direct Testimony of Nicolas S. Economides on behalf of AT&T at 52 (Feb. 9, 2004).

¹⁶ Docket No. 28607, Direct Testimony of Joe Gillan on behalf of the CLEC Coalition at 35 (Feb. 9, 2004).

¹⁷ *Id.* at 40-61.

¹⁸ Docket No. 28607, Rebuttal Testimony of Joe Gillan at 10 (Mar. 19, 2004).

¹⁹ Docket No. 28607, Direct Testimony of Matt Asmus on behalf of Logix at 3 (Feb. 9, 2004).

²⁰ Docket No. 28607, Direct Testimony of Terry L. Murray on behalf of MCI at 37 (Feb. 9, 2004).

²¹ *Id.* at 54.

Sprint argued that MSA should be the geographic market, and laid out several criteria that the Texas PUC should consider before counting a CLEC switch toward the trigger.²² The Department of Defense concurred with Sprint's proposed criteria for evaluating whether a switch should count toward meeting the trigger.²³ Both the American Association of Retired Persons (AARP) and the Texas Office of Public Utility Counsel (TOPUC) recommended that the geographic market should be clusters of central offices.²⁴ TOPUC recommended that the Texas PUC should establish criteria before counting a CLEC switch toward the trigger.²⁵ AARP recommended that the Texas PUC study residential and small business mass market customers separately in order to develop an impairment analysis that is sufficiently granular.²⁶

C. Docket No. 28744 – *Impairment Analysis for Dedicated Transport* (Dedicated Transport)

SBC Texas was the only ILEC or party that sought route-specific review²⁷ of the FCC's nationwide impairment findings under the self-provisioning trigger for dark fiber and DS3 transport²⁸ and the wholesale competition trigger for dark fiber, DS3, and DS1 transport.²⁹ SBC Texas asserted that that the self-provisioning trigger had been satisfied with respect to DS3 and dark fiber transport for 132 routes located in the Austin, Dallas/Fort Worth, Houston, and San Antonio, Texas areas;³⁰ and the wholesale trigger had been met with respect to DS1, DS3, and dark fiber transport for 280 routes.³¹ All of the routes identified by SBC Texas utilize fiber-facilities.³²

²² Docket No. 28607, Direct Testimony of Dr. Brian K. Staihr on behalf of Sprint at 5-6 (Feb. 9, 2004).

²³ Docket No. 28607, Reply Testimony of Richard B. Lee on behalf of DOD at 6 (Mar. 19, 2004).

²⁴ Docket No. 28607, Direct Testimony of Mark Cooper on behalf of OPUC at 4 (Feb. 9, 2004) (Cooper Direct); Direct Testimony of Ben Johnson on behalf of AARP at 2 (Feb. 9, 2004) (Johnson Direct).

²⁵ Docket No. 28607, Cooper Direct at 5-6.

²⁶ Docket No. 28607, Johnson Direct at 3.

²⁷ *TRO* at ¶ 394-404.

²⁸ *See id.* ¶¶ 405-411.

²⁹ *See id.* ¶¶ 412-416.

³⁰ Docket No. 28744, SBC Opening Brief Redacted at 25, 55 (May 7, 2004) (SBC Brief).

³¹ *Id.* at 55.

³² *Id.* at 21.

One issue raised by CLECs was what routes and facilities are included in the *TRO*'s definition of "dedicated transport,"³³ and, therefore, should be considered in conducting the impairment analysis. CLECs argued that dedicated transport refers only to *unswitched* transport between ILEC wire centers.³⁴ AT&T argued that the fact that a CLEC is collocated at two wire centers is not an indication that the CLEC is "operationally ready" to provide dedicated transport. According to AT&T, SBC Texas's approach does not go "beyond the fact that [a CLEC] has two collocations into which it has terminated fiber optic cable onto some optronics equipment."³⁵ Other issues raised by CLECs included, but were not limited to:

- (1) Whether all OCn level transport facilities should be included in the impairment analysis or only those facilities that are used to serve less than the amount available as UNEs (twelve DS3s of demand).³⁶ In short, whether the analysis for dedicated transport must be capacity-specific as well as route-specific;³⁷
- (2) With respect to the wholesale trigger analysis, carriers' willingness to provide wholesale dedicated transport between ILEC central offices;³⁸ and
- (3) The meaning/interpretation of such *TRO* terms as "operationally ready," "willing immediately," and "widely available."³⁹

SBC Texas argued that the *TRO* defines a "route" as any path between two ILEC central offices, regardless of the physical path or facilities in between.⁴⁰ SBC Texas also asserted that the FCC's rules do not require a carrier to deploy "specially dedicated, physically separate

³³ *TRO* at ¶ 365.

³⁴ Docket No. 28744, CLEC Loop/Transport Coalition, Covad Communications Company, and El Paso Networks, LLC Public Brief at 20-22 (May 7, 2004) (CLEC Brief).

³⁵ Docket No. 28744, AT&T Transport Impairment Brief at 18 (May 7, 2004) (AT&T Brief); *see also* Docket No. 28744, MCI Post-Hearing Brief Regarding Transport at 14-15 (May 7, 2004) (MCI Brief).

³⁶ Docket No. 28744, CLEC Brief at 23-27; Docket No. 28744, AT&T Brief at 25-28.

³⁷ Docket No. 28744, AT&T Brief at 25; Docket No. 28744, Sprint Initial Post Hearing Brief at 9-12 (May 7, 2004) (Sprint Brief); Docket No. 28744, Docket No. 28744, Sprint Reply Brief at 14-16 (May 21, 2004) (Sprint Reply Brief); Docket No. 28744, Logix Post Hearing Brief at 7-9 (May 7, 2004) (Logix Brief); Docket No. 28744, MCI Brief at 14-15, 31-32.

³⁸ Docket No. 28744, AT&T Brief at 34-37.

³⁹ Docket No. 28744, CLEC Loop/Transport Coalition, Covad Communications Company, and El Paso Networks, LLC Reply Brief at 16-17 (May 21, 2004); Docket No. 28744, AT&T Brief at 31-32; Docket No. 28744, Sprint Reply Brief at 7-14.

transport facilities,” but only that the carrier “has deployed transport facilities.”⁴¹ According to SBC Texas, CLECs are attempting to complicate the analysis with issues regarding a carrier’s motives and underlying business decisions leading to the deployment of facilities.⁴²

In its self-provisioning case, SBC Texas asserted that it relied on two primary sources to identify carriers that have deployed transport facilities: “(i) information that the competing providers furnished about their own transport facilities in discovery, and (ii) [SBC Texas’s] own records of competing carriers that have collocated and deployed fiber transport facilities at SBC Texas central offices.”⁴³ Regarding the test for potential deployment, SBC Texas asserts that while CLECs may dispute whether the self-provisioning trigger has been technically met, “they do not and cannot dispute that the theoretical sources of impairment identified by the FCC have been overcome.”⁴⁴ According to SBC Texas, the identified carriers “have already obtained the necessary rights of way, deployed fiber optic facilities, and collocated in the applicable central offices. They have already considered the appropriate customer density and market factors, made a decision to deploy fiber along the routes, and successfully carried out that decision.”⁴⁵ From SBC Texas’s perspective, therefore, the remaining issue is one of equipment costs, which it claims the record confirms would not preclude deployment or impair competing carriers.⁴⁶

In its wholesale provisioning case, SBC Texas asserted that the principal wholesale trigger is the willingness of a carrier to provide dedicated transport on a widely available basis to other carriers.⁴⁷ According to SBC Texas, various combinations of the following carriers satisfied the trigger for the routes identified: AT&T, Allegiance, Level 3, Looking Glass, MCI, Time Warner Telecom, Xspedius and XO.⁴⁸ SBC Texas argued that only Xspedius, Allegiance, and AT&T did not confirm their status as wholesale providers, but that the status of these

⁴⁰ Docket No. 28744, SBC Brief at 21.

⁴¹ *Id.* at 22 (*citing* 47 C.F.R. § 51.319(e)(2)(i)(A)(1)).

⁴² *Id.* at 22-23.

⁴³ *Id.* at 23.

⁴⁴ *Id.* at 52.

⁴⁵ *Id.*

⁴⁶ *Id.* at 53.

⁴⁷ *Id.*

⁴⁸ *Id.* at 42.

carriers is “often rebutted by their own statements (and those of other carriers) on the public record.”⁴⁹ Regarding Allegiance, Level 3, Looking Glass, MCI, and Time Warner Telecom, SBC Texas asserts that these carriers’ responses to discovery requests and the Texas PUC’s bench requests for information demonstrate that they satisfy the wholesale trigger.⁵⁰ Regarding XO, SBC Texas asserts that its public website and network maps show that it meets the wholesale trigger.⁵¹

D. Docket No. 28745 – Impairment Analysis for Enterprise Market Loop Facilities (Enterprise Market Loop Facilities)

SBC Texas was the only ILEC or party that sought location-specific review⁵² of the FCC’s nationwide impairment findings with respect to dark fiber loops, DS3 loops and DS1 loops. SBC Texas asserted that that the self-provisioning trigger had been satisfied for 193 locations for DS3 loops and 200 locations for dark fiber loops; and the wholesale provisioning trigger had been satisfied for 104 locations.⁵³ SBC Texas also asserted that an additional 994 customer locations along commercial arteries within the business districts of Austin, Dallas/Ft. Worth, Houston, and San Antonio, Texas satisfied the FCC’s “potential deployment” analysis.⁵⁴

Like the Dedicated Transport proceeding, CLECs challenged SBC Texas’s approach in identifying loops it asserts satisfy the trigger analysis.⁵⁵ For example, CLECs challenged SBC Texas’s identifying OCn facilities to a given location without proving whether the fiber facility was channelized to provide DS3 service.⁵⁶ CLECs also challenged SBC Texas’s inclusion in the self-provisioning analysis of locations served by more than two DS3 loops and locations⁵⁷ where

⁴⁹ *Id.*

⁵⁰ *Id.* at 43-46.

⁵¹ *Id.* at 46-47.

⁵² *TRO* at ¶¶ 328-31.

⁵³ Docket No. 28745, SBC Initial Redacted Brief at 4 (May 19, 2004) (SBC Brief).

⁵⁴ *Id.*

⁵⁵ Docket No. 28745, AT&T Post-Hearing Initial Brief at 13-14 (May 19, 2004) (AT&T Brief); Docket No. 28745, Sprint Initial Post-Hearing Brief at 4-8 (May 19, 2004) (Sprint Brief).

⁵⁶ Docket No. 28745, AT&T Brief at 14; Docket No. 28745, CLEC Loop/Transport Coalition, Covad Communications Company, and El Paso Networks, LLC Redacted Loops Brief at 18 (May 19, 2004) (CLEC Brief); Docket No. 28745, Logix Post-Hearing Brief at 4-9 (May 19, 2004) (Logix Brief).

⁵⁷ Docket No. 28745, AT&T Brief at 17-21.

the CLEC does not have full access to the relevant location,⁵⁸ and also SBC Texas's position that, wherever a carrier has deployed fiber loops, it may be assumed that the carrier has dark fiber loops available.⁵⁹

With respect to the wholesale provisioning analysis, the CLEC Coalition argued that the disputes are purely factual⁶⁰ and that the locations SBC Texas claims meet the trigger include carriers that affirmatively denied that they provide wholesale loops.⁶¹ Sprint asserted that SBC Texas unknowingly listed 16 SBC Texas central offices as trigger locations.⁶² CLECs also challenged SBC Texas's position that if a carrier has an OCn-level facility at a particular customer location and the carrier holds itself out as a wholesaler, then the wholesale trigger is satisfied at that location.⁶³ According to AT&T, SBC Texas's position is that a carrier's willingness and readiness to provide wholesale DS1 and DS3 loops at specific customer locations must be inferred from the most general advertising of wholesale services.⁶⁴ AT&T asserts that SBC Texas fails to recognize that a wholesaler's loop must provide a connection at the central office where the subject loop would be served by the ILEC in order to provide a reasonable substitute for the ILEC's UNE high-capacity loop.⁶⁵

Regarding the potential deployment analysis, CLECs argued that SBC Texas's approach is flawed, *inter alia*, in that one potential deployer is not sufficient, it is not location specific, and its evidence is flawed with respect to costs and revenue assessments at the identified locations.⁶⁶

SBC Texas argued that the CLECs' position is a curious one that seeks to exclude locations based on the trigger candidate deploying *too many* DS3s (*i.e.*, more than two), and is due to the fact that they cannot dispute that for all of the locations identified, the carriers have

⁵⁸ Docket No. 28745, AT&T Brief at 21-23; Docket No. 28745, CLEC Brief at 23.

⁵⁹ Docket No. 28745, AT&T Brief at 23-24; Docket No. 28745, Sprint Brief at 11-13.

⁶⁰ Docket No. 28745, CLEC Brief at 33.

⁶¹ *Id.* at 33; *see also* Docket No. 28745, Logix Brief at 9-10.

⁶² Docket No. 28745, Sprint Brief at 18.

⁶³ Docket No. 28745, AT&T Brief at 29; *see also* Docket No. 28745, Sprint Brief at 17.

⁶⁴ Docket No. 28745, AT&T Brief at 30.

⁶⁵ *Id.*

⁶⁶ *See Id.* at 40-49; Docket No. 28745, CLEC Brief at 41-46; Docket No. 28745, Sprint Brief at 21-25.

confirmed that they have deployed high-capacity loops and that they are serving customers.⁶⁷ SBC Texas responded to the channeling assertion by stating that channeling involves nothing more than the insertion of a line-card into the multiplexer, and that the FCC has deemed such activity a routine function and not a source of impairment.⁶⁸ SBC Texas also asserted that its trigger list includes only locations where CLECs have said that they currently self-provision high-capacity loops to that address.⁶⁹ With respect to assuming the presence of dark fiber loops, SBC Texas argued that this is based on the evidence presented by the CLECs and also that it is industry practice to lay more fiber than what is currently needed.⁷⁰ With respect to the wholesale analysis, SBC Texas asserted that its list of locations is derived from CLECs' discovery responses confirming the existence of at least two willing, wholesale trigger candidates that have deployed sufficient fiber optic facilities to each of the locations identified.⁷¹ Regarding potential deployment, SBC Texas argued that the only real question is whether its cost and revenue estimates are reasonable, and whether its identification of locations is specific enough.⁷² According to SBC Texas, they are, because the CLECs neither challenge any of the inputs, calculation methods, or outputs, nor offer any independent estimates of their own.⁷³

IV. Petition for Waiver of Filing Requirements

Fifty-seven parties participated in the Texas PUC's four pending *TRO* proceedings, resulting in the admission of more than 500 exhibits, and approximately 20-25 briefs, 20-25 reply briefs, 10 hearing transcripts, and 5 transcripts from Texas PUC Open Meetings. Each document is estimated at between 20-30 pages, for a conservative estimate of 12,000 hardcopy pages.

Due to the voluminous nature of the *TRO* proceedings' records, and the cost and time associated with duplicating and filing same, the Texas PUC petitions for a waiver pursuant to

⁶⁷ Docket No. 28745, SBC Brief at 17.

⁶⁸ *Id.* at 22.

⁶⁹ *Id.* at 25.

⁷⁰ *Id.* at 27-28.

⁷¹ *Id.* at 29-38.

⁷² *Id.* at 54.

⁷³ *Id.*

FCC rule 1.3⁷⁴ of the filing requirements in FCC rules 1.51 and 1.419⁷⁵ to allow it to file its *TRO* proceedings' records in CD format only. For the same reasons, the Texas PUC also petitions for a waiver of the portions of paragraph 3 of the *Order* adopted in this proceeding on August 20, 2004, requiring commenters to stamp each page of any confidential or proprietary document with the "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN CC DOCKET NO. 01-338 & WC DOCKET NO. 04-313 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION"; and the filing of redacted forms of the confidential information stamped "REDACTED—FOR PUBLIC CONSUMPTION." (Note: The Texas PUC has labeled each CD containing confidential documents with the foregoing confidential information notice; such CDs contain only confidential documents.⁷⁶ Redacted confidential documents are saved to CDs clearly labeled as "Non-confidential.") Finally, and also for the same reasons, the Texas PUC requests a waiver of paragraph 33 of the *NPRM* in order to allow it to file its comments using the FCC's ECFS system, but without having to upload and attach all of the documents on the CDs.

Pursuant to FCC rule 1.3, the FCC may waive its rules for good cause. Good cause may be found when special circumstances exist to warrant a deviation from the general rule,⁷⁷ or where circumstances make strict compliance inconsistent with the public interest.⁷⁸ In this matter, good cause exists simply based on the sheer volume, time, and expense involved with submitting the Texas PUC's *TRO* proceedings' records in paper format. Moreover, the Texas PUC and participating *TRO* parties spent considerable time in compiling the CDs and ensuring that they accurately represented the record from each *TRO* proceeding. Finally, by allowing the Texas PUC to submit its records on CD, the FCC avoids the prospect of being inundated with such records in piecemeal fashion by the participating parties. This is not to say that the Texas

⁷⁴ 47 C.F.R. § 1.3.

⁷⁵ 47 C.F.R. §§ 1.51 and 1.419.

⁷⁶ The designation of an exhibit as confidential is not an indication that the Texas PUC made a substantive determination that the information contained therein is confidential under state law. With few, if any, exceptions, designating of a document as confidential was done by the offering party and not substantively reviewed by the Texas PUC prior to admission.

⁷⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972).

⁷⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166.

PUC does not expect parties to provide comments to the *NPRM* and to include therein additional comments on the Texas PUC's *TRO* proceedings.

V. Conclusion

The Texas PUC dedicated every available resource to these proceedings until the *USTA II* decision was issued, vacating the *TRO*. At that time, the Texas PUC voted to abate its *TRO* proceedings in part due to the stay, as well as the FCC's announcement that it would release interim UNE rules in response to the Court's action. These proceedings remain abated.

In closing, the Texas PUC appreciates the opportunity to provide comments to the FCC in this proceeding and respectfully requests that the FCC allow it to provide the relevant evidentiary record on CD-ROM. The Texas PUC believes that it is important to highlight the current activities taking place at the state level, and urges the FCC to consider the record evidence in the Texas PUC's *TRO* proceedings when considering its revised unbundling requirements.

Respectfully submitted,

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October 4, 2004**

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